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Opinion on remand from the Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD S. HODGE,

Defendant and Appellant.

B264853

Los Angeles County
Super. Ct. No. NA106955-
02

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Reversed and remanded with directions.

Sean K. Kennedy, Center for Juvenile Law & Policy, Loyola Law School, Los Angeles, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Andrew S. Pruitt, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 1996, defendant Richard S. Hodge was convicted of a murder and a robbery he committed when he was 17 years old. Hodge was sentenced to life imprisonment without parole (LWOP), plus 10 years to run consecutively for the robbery conviction and firearm enhancement. In 2013, Hodge filed a petition for a writ of habeas corpus in the superior court, requesting the court resentence him in accordance with *Miller v. Alabama* (2012) 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (*Miller*). In 2015, the court granted Hodge’s petition, vacated Hodge’s LWOP sentence, and conducted a new sentencing hearing. After considering the factors discussed in *Miller*, the court reimposed Hodge’s LWOP sentence.

On August 11, 2016, we issued our original opinion affirming the trial court’s reimposition of Hodge’s LWOP sentence. (*People v. Hodge* (Aug. 11, 2016, B264853 [nonpub.].) On November 22, 2016, the California Supreme Court transferred this matter to this court with “directions to vacate [the August 11, 2016] decision and reconsider the cause in light of *Montgomery v. Louisiana* (2016) 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 [(*Montgomery*)]. (Cal. Rules of Court, rule 8.528(d).)” (*People v. Hodge* (Nov. 22, 2016, No. S237337).)¹ Having done so, we conclude the trial court must determine whether Hodge was the “rarest of juvenile offenders” whose crime reflects “permanent incorrigibility” before sentencing him to LWOP. (*Montgomery*, *supra*, 136 S.Ct. at p. 734.) Accordingly, we reverse and remand for a new sentencing hearing.

¹ After the parties submitted their supplemental briefs responding to the Supreme Court’s November 22, 2016 order, the People filed a motion to strike Hodge’s supplemental brief. The motion is denied.

BACKGROUND²

1. The Carjacking and Murder

On August 9, 1993, Hodge and Virgil Clarke decided to steal a car. Around 7:00 a.m. that morning, Hodge and Clarke approached a car parked near Long Beach Polytechnic High School (Poly), where they were students. Catherine Tucker, the school's crossing guard, was sitting in the car's front seat reading the newspaper. Hodge walked toward the driver's side of the car while Clarke approached the passenger's side. When Tucker turned to look at Hodge, Hodge shot her in the head, killing her. Hodge and Clarke then moved Tucker's body toward the center console of the car and covered it with Tucker's newspaper. Hodge drove the car to an alleyway where they dumped Tucker's belongings into the street and moved her body to the trunk. Hodge then drove to the Los Angeles River, where he and Clarke tried to dispose of Tucker's body; however there were too many people near the river, so they left Tucker's body in the trunk and returned to Poly.

During his first-period class, Hodge passed a note to his friend, Dionisio Kepa, saying that he "killed this bitch." He asked Kepa to meet him after class. Later that day, Hodge, Clarke, and Kepa left campus in Tucker's car. Shortly after leaving campus, Hodge crashed the car into a bus. Hodge, Clarke, and Kepa abandoned the car and fled the scene, but they were arrested shortly after the accident.

Immediately after he was arrested, Hodge denied shooting Tucker. He claimed that he and Clarke decided to take Tucker's car because they found it with the front window down, the keys

² The factual and procedural summary that follows is taken from our original opinion.

in the ignition, and no one in the front seat. Hodge told the police the gun was already on the floorboard when he and Clarke entered the car. However, when Hodge arrived at the police station, he admitted he had had the gun “for some time” and that he had used it to shoot Tucker. Hodge told the police he shot Tucker because he “wanted the car.”

2. The Charges, Trial, and Verdict

Hodge was charged with first-degree murder (Pen. Code,³ § 187, subd. (a)) and second-degree robbery (§ 211). As to the murder charge, the People alleged Hodge committed the murder while engaged in the robbery (§ 190.2, subdivision (a)(17)(A)). As to the murder and robbery charges, the People alleged a principal factor was armed with a firearm (§ 12022, subdivision (a)(1)), and that Hodge personally used a firearm while committing the crimes (§ 12022.5, subd. (a)).

Hodge testified at trial. He recanted the statements he made earlier to the police admitting he shot Tucker. He claimed that on the morning of August 9, 1993, Clarke showed up at his house around 6:30 a.m. to show him a car that Clarke had stolen earlier that morning. When Hodge looked inside the car, he saw Tucker’s body in the passenger seat. Clarke told Hodge he had accidentally shot Tucker, claiming the gun “went off” as he approached Tucker’s car. Hodge decided to help Clarke dispose of Tucker’s body, so he drove Tucker’s car to an alleyway in Long Beach, where they removed most of Tucker’s possessions from the car and placed Tucker’s body in the trunk. Hodge then drove Tucker’s car to school, and he and Clarke went to class. During his first-period class, Hodge wrote Kepa a note saying that he had “a problem” and needed to meet after class to talk about it.

³ All undesignated statutory references are to the Penal Code.

Hodge denied writing a note to Kepa admitting he had killed someone.

When questioned about why he had told the police he killed Tucker, Hodge claimed he had agreed to take the blame for the murder and robbery because he was only 17 years old at the time of the crimes, while Clarke was already 18 years old. Hodge believed that since he was a minor, he would receive only “juvenile time” and stay in prison until he was 25 years old, as opposed to Clarke, who would likely have to spend the rest of his life in prison if convicted of murder.

The jury convicted Hodge of first-degree murder and second-degree robbery. It found true the special-circumstance allegation that Hodge committed the murder while engaged in the robbery. The jury also found true both firearm allegations.

3. Hodge’s Original Sentence

Before the sentencing hearing, the court referred Hodge to the California Youth Authority (Youth Authority) to be evaluated for his amenability to training and treatment offered by the organization. In April 1996, following a 60-day evaluation, the Youth Authority produced a report finding Hodge would be amenable to training and treatment. The Youth Authority recommended Hodge be placed in an age-appropriate rehabilitation facility.

On May 2, 1996, the court conducted Hodge’s sentencing hearing. The court considered the Youth Authority’s amenability report and heard argument from Hodge’s counsel requesting the court exercise its discretion under section 190.5⁴ to sentence

⁴ Section 190.5 provides in relevant part: “The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was

Hodge to 25 years to life in prison instead of LWOP. The court rejected counsel's request and sentenced Hodge to LWOP on his first-degree murder conviction. The court explained its decision as follows. "Under Penal Code section 190.5, I don't believe it is appropriate to basically stay the special circumstance finding of true by the jury. [¶] Based on the circumstances of the offense, the planning involved, vulnerability of the victim, the execution style shooting of the victim, I don't believe it's appropriate to stay or strike the special circumstance finding. [¶] So far as circumstances in aggravation, the victim was particularly vulnerable in her vehicle at that hour. The defendant's crime here, both crimes were planned, not impulsive, involve another as a lookout. There is added culpability for involving another. [¶] The defendant at the time and shortly after the offenses showed no remorse, no emotional effect. [¶] In mitigation, he has no record of violence and now does show remorse. [¶] The circumstances in aggravation outweigh those in mitigation." The court then imposed a consecutive five-year term for the personal-use firearm allegation and a consecutive five-year term for the second-degree robbery conviction, for a total sentence of LWOP plus 10 years.⁵

16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." (§ 190.5, subd. (b).)

⁵ Hodge appealed from the court's original judgment, arguing that under section 654, the court should have stayed imposition of the consecutive five-year term for his robbery conviction. In a nonpublished opinion (*People v. Hodge* (April 18, 1997, B103959)), we modified Hodge's sentence to stay imposition of the consecutive five-year term, reducing Hodge's total sentence to LWOP plus five years. We otherwise affirmed the judgment.

4. The Habeas Petition

On July 25, 2013, Hodge filed a petition for a writ of habeas corpus in the trial court, challenging the constitutionality of his LWOP sentence in light of *Miller*. Hodge argued he was entitled to a new sentencing hearing to allow him to present mitigating evidence relevant to the factors discussed in *Miller*. In their response to Hodge's petition, the People conceded Hodge was entitled to a new sentencing hearing. The People also conceded that section 1170, subdivision (d)(2), which allows a prisoner who was sentenced to LWOP as a juvenile to petition the trial court for recall of sentence and resentencing after he or she has served 15 years of that sentence, did not provide an adequate remedy to challenge the constitutionality of an LWOP sentence imposed on a juvenile offender before *Miller* was decided.

5. The New Sentencing Hearing and Hodge's Mitigating Evidence

On April 13, 2015, the same judge who presided over Hodge's trial and original sentencing hearing vacated Hodge's LWOP sentence on the murder conviction⁶ and granted Hodge a new sentencing hearing. In support of his request for a non-LWOP sentence, Hodge filed a sentencing memorandum and statement in mitigation of punishment, supported by more than 150 pages of exhibits, including Hodge's original sentencing memorandum filed in 1996, the Youth Authority's amenability report filed in 1996, and statements and reports from three experts recommending Hodge receive a non-LWOP sentence.

Efty Sharony, a Senior Mitigation Specialist and Social Worker for Loyola Law School's Center for Juvenile Law and

⁶ The court did not vacate Hodge's five-year term for the firearm allegation.

Policy, submitted a written report and provided unsworn testimony at Hodge's new sentencing hearing. In preparing her report and testimony, Sharony interviewed Hodge, Hodge's mother and father, Clarke, and Hodge's high-school girlfriend, Kim Sutton. Sharony also reviewed the Youth Authority's amenability report filed in 1996, Hodge's records from the California Department of Corrections and Rehabilitation (Department of Corrections), Hodge's mental health records, and the records from Hodge's trial. Sharony's report and testimony outline Hodge's youth and family background.

Hodge grew up in Pittsburgh, Pennsylvania, where he lived with his mother and younger brother. Hodge's father, who suffered from Schizophrenia and abused drugs and alcohol, sometimes lived with the family, but he would disappear for extended periods of time. He was absent for much of Hodge's childhood and did not provide financial support for the children. Hodge's father also was abusive toward Hodge's mother, often physically and sexually assaulting her in front of the children, but he never physically or sexually abused Hodge or Hodge's brother.

Hodge attended school in Pittsburgh through the seventh grade. Around the time he entered the eighth grade, Hodge moved with his mother and brother to Long Beach. While in Long Beach, Hodge's family would often rely on government aid for support, and they frequently lived in government-subsidized housing. At one point, Hodge's family lived in an apartment complex that was controlled by the Rolling 20s Crips. Although he never joined a gang, Hodge became friends with some gang members. Hodge's brother also began associating with gang members, and he was arrested several times. After arriving in Long Beach, Hodge's mother moved the family to at least eight

different apartments in a six-year period due to the family's financial struggles and Hodge's brother's behavioral problems.

Before his sophomore year of high school, Hodge transferred to Poly. Hodge joined the school's ROTC program, where he met Clarke, who was a member of the Rolling 20s gang. Clarke usually carried a gun, and he would often get into fights. Hodge looked up to Clarke and relied on him for protection.

During his sophomore year of high school, Hodge developed a serious romantic relationship with Kim Sutton. In April 1993, Kim cheated on Hodge with one of Hodge's friends. Kim's relationship with Hodge's friend, which lasted for several months, was difficult for Hodge to cope with. Nevertheless, Hodge continued to date Kim. Clarke often ridiculed Hodge for continuing to see Kim, and he would often encourage Hodge either to beat up the friend who was seeing Kim or to stop talking to Kim.

As a teenager, Hodge suffered several concussions, some of which temporarily changed his demeanor. When Hodge was 15 years old, he suffered a concussion after he was thrown from his bicycle during a collision with a car. Hodge's mother recalled that his behavior changed after the accident. He became aggressive and short-tempered, which, according to Hodge's mother, was out of character compared to his good-natured demeanor before the accident. Hodge also suffered a concussion after he was struck in the head with the butt of a rifle during ROTC practice.

Prior to killing Tucker, Hodge had never been involved in any reported incidents of violence, and he did not have a criminal history. According to Hodge's mother, Hodge generally had a fun-loving and people-pleasing attitude. Kim described Hodge as quiet, artsy, and affectionate. Clarke described Hodge as "not rough." Clarke told Sharony that Hodge did not like to fight and

that it was out of character for Hodge “ ‘to do something like this,’ ” referring to the murder and carjacking. Sharony opined that based on Hodge’s lack of a prior history of violent or criminal misconduct, Hodge was likely motivated by peer pressure to participate in the carjacking with Clarke. Sharony believed that Clarke, whom Hodge looked up to, was pressuring Hodge to act like a man after Kim cheated on him. According to Sharony, Hodge decided to go along with the carjacking because he believed he needed to impress Clarke, and he wanted to compensate for his own feelings of low self-esteem.

Dr. Barry Krisberg, an expert in criminology, submitted a declaration in support of Hodge’s sentencing memorandum. In preparing his declaration, Dr. Krisberg reviewed Hodge’s records from the Department of Corrections, Hodge’s habeas petition, and the documents supporting the petition.

Hodge’s behavior in prison has been positive. During his nearly 20 years of incarceration, Hodge has had very few disciplinary charges, and he has not engaged in any significant violent conduct. Hodge also has participated in anger-management and drug-rehabilitation programs, and he earned his GED while housed with the Youth Authority before his transfer to the Department of Corrections. Hodge is well-liked by the Department of Corrections staff, who often describe him as “polite and respectful.” Dr. Krisberg concluded that, in light of Hodge’s good behavior in prison, which corroborates the Youth Authority’s prior determination that Hodge would be amenable to training and treatment, and the fact that Hodge was under the age of 18 at the time he committed the homicide, reimposing an LWOP sentence would be unreasonable.

Dr. Barbara Counter, a clinical and forensic psychologist, submitted a psychological evaluation report in support of Hodge’s sentencing memorandum. In preparing her report, Dr. Counter

interviewed Hodge in March 2015 and reviewed Hodge's social history report, Hodge's original sentencing memorandum, the Youth Authority's amenability report, and Hodge's records from the Department of Corrections.

According to Dr. Counter, Hodge was less culpable at the time of Tucker's murder due to his age, and he has since demonstrated a capacity to change based on his good behavior over the course of nearly twenty years in prison. Dr. Counter opined that, at the time of Tucker's murder, Hodge exhibited signs of "Adolescent Brain Development," which is associated with the following behavioral indicators: (1) immaturity; (2) lack of ability to consider alternative courses of action; (3) criminal behavior; (4) heightened risk taking; (5) immature decision making; (6) immaturity of judgment; (7) poor future orientation; (8) lower likelihood of weighing the consequences of one's actions; (9) impulsivity; and (10) difficulty making decisions that are in one's best long-term interests. Dr. Counter also believed that the concussions Hodge suffered prior to Tucker's murder had stifled his brain's development, in turn increasing his desire to engage in dangerous and risk-taking behavior as a teenager. Dr. Counter recommended Hodge receive a non-LWOP sentence based on his "diminished culpability at the time of the crime, as well as his hardiness, resilience, developing insight and proven ability to grow, change and learn from life experiences."

Hodge also addressed the court at the sentencing hearing. He attributed his participation in the murder and carjacking to the absence of a father figure during his childhood and adolescence, as well as his impressionability as a teenager. According to Hodge, he "let go of [his] moral compass" when he allowed Clarke to convince him to participate in the carjacking. Hodge took responsibility for shooting Tucker and expressed remorse for killing her.

Defense counsel acknowledged that Hodge was a full participant in Tucker's murder and did not try to minimize Hodge's responsibility. However, counsel argued that in order for the court to reimpose LWOP on Hodge, it would have to find he was incorrigible and irreparably corrupt at the time of the murder and carjacking, something that counsel claimed the court could not find based on Hodge's youth and post-conviction behavior. Counsel pointed out that, despite growing up in an unstable household with no father figure, Hodge had no criminal record or any documented negative interactions with law enforcement before Tucker's murder, and he was never a member of a criminal street gang. Counsel asserted Hodge had shown signs of rehabilitation by taking responsibility and expressing remorse for killing Tucker.

The prosecutor argued that *Miller* did not require the court to impose a non-LWOP sentence for Hodge's murder conviction. The prosecutor asserted Hodge did not act impetuously when he committed the murder and carjacking. Hodge, not Clarke, had possession of the gun when Clarke posed the idea of stealing a car. Hodge acted according to a plan, and he was the one who used the gun during the crime. The prosecutor focused on how Hodge killed Tucker in an execution manner and showed no remorse shortly after killing her, moving her body to the trunk of her car, driving her car with her body still in it to and from his high school, and bragging about killing her to another student at his school. The prosecutor acknowledged Hodge had a difficult upbringing, but he contended Hodge's background did not mitigate against reimposing an LWOP sentence in light of Hodge's callous and calculated behavior before, during, and after the murder of Tucker.

In deciding whether to reimpose an LWOP sentence on Hodge, the court stated it was aware of, and would weigh, the

Miller factors relevant to making such a determination. The court also stated that in making its determination, it would not take into account the fact that, even if he were resentenced to LWOP, Hodge could ask the Governor to commute his sentence, or ask the Parole Board to release him on parole.

The court described its application of the *Miller* factors to Hodge's case as follows:

"Under [*People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*)] and, of course, *Miller*, the court has to look at the juvenile offender's chronological age, 11 months shy of 18. Of course, we all know that a 17-year-old can be extremely immature and a 14-year-old can be mature on the other side. I do take into account the age, but it is certainly not determinative.

"I do take into account the evidence presented by the defense, including the statement and report of specialist Efty Sharony and the California Youth Authority amenability determination at the time of sentencing, plus the other declarations by the defense experts, Barry Krisberg, and so forth, and their opinion stating that [Hodge] is amenable to change and acted immaturity and with impetuosity at the time of this offense. I do acknowledge that.

"It is true that [Hodge] came from a dysfunctional family without a father figure to raise him, was exposed to violence, lived in a neighborhood dominated or affected by criminal gang activity. I note the abuse of alcohol, the tendency to give in to peer pressure, the issues with the girlfriend at the time.

"Jumping to the fourth factor, we have no evidence about any plea negotiations that might have occurred had the [prior defense] sought that . . . , not these counsel here.[7]

⁷ Although the record from Hodge's trial reflects the prosecution offered Hodge 30 years to life in state prison in exchange for pleading

“So I do take into account under what might be called the fifth factor all the information regarding the possibility of rehabilitation.

“What I need to do in this instance is determine Mr. Hodge’s character at the time of the offense. So that is the determinative matter for me to decide, and I do agree with the District Attorney, although I don’t adopt the term ‘heinous,’ because this offense at the time of its commission was such that it did demonstrate a callousness on the part of Mr. Hodge. He did act in cold blood. He was repentant at the time of the original sentencing and now certainly is, but until then he was not. He was the actual shooter. There are no impetuosities as shown by the facts because this was a desire to have a car available for private use. It was not sophisticated, plainly. Taking the body to school, showing it to others was clearly an invitation to be discovered by the police. So I agree with the D.A. that the conduct post the commission demonstrates that he was concerned about the effects of the offense, he knew what he had done at the time, and although 17, was acting in a mature fashion.”

The court concluded: “All these facts, under all the considerations of *Gutierrez* and *Miller*, require me to consider, I do find that at the time of the commission of that offense, the time of the original sentencing, Mr. Richard Hodge unfortunately is, was incorrigible, irreparably, and is not amenable to change.” The court then reimposed Hodge’s LWOP sentence for his murder conviction.

guilty to first-degree murder and the firearm allegation, Hodge’s counsel did not mention the offer in Hodge’s new sentencing memorandum or bring it to the court’s attention at the hearing.

DISCUSSION

In our original opinion, we addressed the following issues: (1) whether it was reversible error for the same judge who presided over Hodge’s trial and original sentencing hearing to rule on Hodge’s habeas petition and conduct the April 2015 sentencing hearing; and (2) whether the court misapplied *Miller* and violated the Eighth Amendment when it resentenced Hodge to an LWOP term. In its transfer order, the California Supreme Court directed us to reconsider the cause in light of *Montgomery*, a United States Supreme Court case interpreting *Miller* that was decided after Hodge’s April 2015 sentencing hearing. The transfer order makes no reference to the first issue addressed in our original opinion. Our discussion below therefore focuses on whether the trial court properly reimposed Hodge’s LWOP sentence in light of the principles established in *Montgomery*.⁸

1. The Eighth Amendment and Juvenile LWOP Sentences

The Eighth Amendment guarantees “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” (U.S. Const., 8th Amend.) This means that punishment for crime “‘should be graduated and proportioned to [the] offense.’ [Citation.]” (*Roper v. Simmons* (2005) 543 U.S. 551, 560, 125 S.Ct. 1183, 161 L.Ed.2d 1 (*Roper*).) What constitutes “cruel and unusual” punishment under the

⁸ In our earlier decision, we affirmed the trial court’s procedure for ruling on Hodge’s habeas petition, concluding section 859c does not apply to post-conviction habeas petitions and that the trial judge who conducted Hodge’s original sentencing hearing in 1996 was the appropriate judge to conduct his resentencing hearing in 2015. We would reach the same conclusion if that issue were before us under the Supreme Court’s November 22, 2016 order.

Eighth Amendment is a fluid concept that is determined by looking not only to historical conceptions, but also to “ ‘the evolving standards of decency that mark the progress of a maturing society.’ ” [Citations.]” (*Graham v. Florida* (2010) 560 U.S. 48, 58, 130 S.Ct. 2011, 176 L.Ed.2d 825 (*Graham*).)

1.1. *Miller* and its predecessors

After Hodge was sentenced to LWOP in 1996, the United States Supreme Court issued three decisions expanding on the Eighth Amendment’s application to juvenile offenders. Beginning with *Roper*, the Court held death sentences for juvenile offenders violate the Eighth Amendment. (*Roper, supra*, 543 U.S. at p. 578.) Five years later, the Court decided *Graham*, holding the Eighth Amendment bars the imposition of LWOP on juvenile offenders convicted of nonhomicide offenses. (*Graham, supra*, 560 U.S. at p. 82.) Most recently, in *Miller*, the Court further limited the application of LWOP to juvenile offenders, holding the Eighth Amendment prohibits sentencing schemes that mandate LWOP for a juvenile convicted of a homicide offense. (*Miller, supra*, 567 U.S. at pp. 470, 479.)

Underlying all three of these decisions is the Court’s recognition that significant differences exist between adult and juvenile offenders for purposes of sentencing. (*Miller, supra*, 567 U.S. at p. 471 [recognizing that “children are constitutionally different from adults for purposes of sentencing”], citing *Roper, supra*, 543 U.S. at p. 569 and *Graham, supra*, 560 U.S. at p. 68.) “First, children have a ‘ “lack of maturity and an underdeveloped sense of responsibility,” ’ leading to recklessness, impulsivity, and heedless risk-taking. [Citation.] Second, children ‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[l] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings. [Citation.]

And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' [Citation.]" (*Miller, supra*, 567 U.S. at p. 471.) These "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." (*Id.* at p. 472.)

In concluding a mandatory LWOP sentence for a juvenile offender violates the Eighth Amendment, the Court in *Miller* also looked to the application of the death penalty to adult offenders—specifically, the requirement that a sentencer make an individualized determination that the death penalty is an appropriate sentence for each defendant in a capital case before he or she may be sentenced to death. (*Miller, supra*, 567 U.S. at pp. 474–479.) The Court reasoned that because LWOP is tantamount to a death sentence for a juvenile offender, the Eighth Amendment requires the sentencing court to make an individualized determination that LWOP is a suitable sentence for the juvenile offender before such sentence may be imposed. (*Ibid.*)

The Court in *Miller* outlined five factors that generally will be relevant to the individualized determination that must be performed before a juvenile offender may be sentenced to LWOP. (*Miller, supra*, 567 U.S. at pp. 477–478.) Those factors are: (1) the juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds [the juvenile]—and from which [the juvenile] cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have

affected him”; (4) whether the juvenile “might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, [the juvenile’s] inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys”; and (5) “the possibility of rehabilitation[,]” including the extent or absence of the juvenile’s criminal history. (*Ibid.*; see also *Gutierrez, supra*, 58 Cal.4th at pp. 1388–1389.)

Although the Court in *Miller* declined to declare all LWOP sentences for juveniles unconstitutional, it cautioned that such sentences should be appropriate only in rare circumstances. The Court stated: “[G]iven all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ [Citations.] Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Miller, supra*, 567 U.S. at pp. 479–480, fn. omitted.)

1.2. *Montgomery*

In 2016, the United States Supreme Court decided *Montgomery*. In *Montgomery*, the Court held that *Miller* announced a new substantive rule of constitutional law that must be given retroactive application in state court collateral review proceedings. (*Montgomery, supra*, 136 S.Ct. at pp. 725, 732–737.) The Court explained that *Miller* established a substantive rule

that identifies a class of defendants for whom an LWOP sentence is unconstitutional: juvenile offenders convicted of homicide offenses whose crimes reflect “ ‘unfortunate yet transient immaturity.’ ” [Citations.]” (*Id.* at p. 734.) Thus, the Court cautioned that an LWOP sentence can be imposed only on “the rarest of juvenile offenders,” those whose homicide offenses reflect “permanent incorrigibility” or “such irretrievable depravity that rehabilitation is impossible.” (*Id.* at pp. 733, 734.)

While acknowledging that principles of federalism prevented the Court in *Miller* from requiring state courts to make explicit findings that a juvenile offender is irreparably corrupt before imposing an LWOP term, the Court recognized that “ ‘appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.’ ” (*Montgomery, supra*, 136 S.Ct. at pp. 733–735, quoting *Miller, supra*, 567 U.S. at p. 479.) Specifically, the Court concluded the fact “[t]hat *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.” (*Montgomery, supra*, 136 S.Ct. at p. 735.)

1.3. California cases addressing *Miller* and *Montgomery*

In California, section 190.5 provides the sentencing framework for juveniles convicted of crimes normally eligible for sentences of death and LWOP. Subdivision (a) prohibits the imposition of the death penalty on any offender who was under the age of 18 at the time the crime was committed. (§ 190.5, subd. (a).) Subdivision (b) gives the court discretion to sentence a juvenile who was over the age of 16 at the time he or she committed a special-circumstance murder to LWOP or 25 years to life in prison. (§ 190.5, subd. (b).)

Prior to *Miller*, California courts interpreted section 190.5, subdivision (b), to create a presumption in favor of imposing LWOP on qualifying juvenile offenders. (See *Gutierrez, supra*, 58 Cal.4th at pp. 1360, 1369–1370.) In *Gutierrez*, the California Supreme Court reexamined section 190.5 and held that when properly construed, the statute does not create a presumption in favor of imposing LWOP on qualifying juvenile offenders. (*Id.* at pp. 1371, 1387.) Rather, the statute requires a sentencing court to consider the *Miller* factors before imposing such a sentence on a juvenile. (*Id.* at p. 1387.)

The court in *Gutierrez* explained the sentencing court’s role under section 190.5, subdivision (b). “[T]he trial court must consider all relevant evidence bearing on the ‘distinctive attributes of youth’ discussed in *Miller* and how those attributes ‘diminish the penological justifications for imposing the harshest sentences on juvenile offenders.’ [Citation.] To be sure, not every factor will necessarily be relevant in every case. For example, if there is no indication in the presentence report, in the parties’ submissions, or in other court filings that a juvenile offender has had a troubled childhood, then that factor cannot have mitigating relevance. But *Miller* ‘require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.’ [Citation.]” (*Gutierrez, supra*, 58 Cal.4th at p. 1390, second alteration in original.) Relevant evidence of the “distinctive attributes of youth” includes evidence of postconviction rehabilitation, such as a defendant’s good behavior in prison since he or she was sentenced to LWOP as a juvenile. (*People v. Lozano* (2016) 243 Cal.App.4th 1126, 1137–1138 (*Lozano*).)

After *Gutierrez* was decided, the appellate court in *People v. Palafox* (2014) 231 Cal.App.4th 68 (*Palafox*) addressed how

sentencing courts should apply the *Miller* factors when determining whether to impose an LWOP term on a juvenile offender under section 190.5. In *Palafox*, the defendant, who was sixteen years old at the time of his offenses, was convicted of two counts of first-degree murder and sentenced to two consecutive LWOP terms. (*Id.* at pp. 73, 81.) Because the defendant was sentenced before *Miller* was decided, the reviewing court remanded the case for resentencing. (*Id.* at pp. 74–75.) On remand, the trial court reimposed the defendant’s consecutive LWOP terms. (*Id.* at pp. 74–81.) In discussing its application of *Miller*, the trial court acknowledged that it could not exclude the “significant possibility of [the defendant] rehabilitating.” (*Id.* at p. 80.) Nevertheless, the court found the weight of the *Miller* factors supported reimposing the defendant’s LWOP sentences. (*Id.* at pp. 80–81.)

On appeal, the defendant argued his sentence was unconstitutional because the trial court had not ruled out the possibility that he could be rehabilitated in the future. (*Palafox, supra*, 231 Cal.App.4th at p. 90.) In affirming the defendant’s sentence, the reviewing court recognized that although *Miller* cautions that LWOP will be an appropriate sentence only in the rare circumstance where a juvenile offender is irreparably corrupt, the Supreme Court did not hold that any one of the factors outlined in *Miller* must take precedence over any of the other factors. Rather *Miller* requires only “‘that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.’ [Citation.]” (*Id.* at p. 91, quoting *Miller, supra*, 567 U.S. at p. 483.) Thus, according to *Palafox*, a sentencing court exercising its discretion under section 190.5 may afford whatever weight it reasonably determines appropriate to each of the *Miller* factors in light of the circumstances of the case. (*Palafox, supra*,

231 Cal.App.4th at pp. 73, 91.) Because the trial court considered all of the relevant evidence and weighed the applicable *Miller* factors, it did not abuse its discretion in imposing LWOP on the juvenile defendant. (*Id.* at p. 91.)

In *People v. Blackwell* (2016) 3 Cal.App.5th 166 (*Blackwell*), the defendant, who had an extensive criminal history as a juvenile, challenged his LWOP sentence imposed for a homicide offense he committed while he was a juvenile. (*Id.* at pp. 182–203.) The defendant argued his sentence violated *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (*Apprendi*), because a jury did not make factual findings regarding the *Miller* factors before the court imposed his LWOP sentence. (*Blackwell, supra*, 3 Cal.App.5th at pp. 182–195.) After rejecting the defendant’s *Apprendi* argument, the reviewing court concluded the trial court did not abuse its discretion by affording more weight to the circumstances of the defendant’s crime than the defendant’s immaturity before imposing an LWOP term. (*Id.* at pp. 199–203.) The court followed the approach adopted in *Palafox* that a sentencer may give whatever weight it reasonably deems appropriate to the *Miller* factors, so long as it gives due consideration to all of the relevant factors. (*Id.* at pp. 200–201.) Because the trial court explicitly considered all of the *Miller* factors, it did not err when it selected an LWOP term based “primarily on [the defendant’s] circumstances and the heinous nature of the offense.” (*Id.* at p. 201.)

In *People v. Padilla* (2016) 4 Cal.App.5th 656 (*Padilla*), which was decided after we issued our original opinion in this case, our colleagues in Division Four examined how *Montgomery* affects *Miller*’s holding.⁹ The court interpreted *Montgomery* as

⁹ On January 25, 2017, the California Supreme Court granted review in *Padilla*, requesting the parties to brief the following issue:

“significantly recast[ing] *Miller*” such that *Miller* “must be regarded as announcing a substantive rule barring LWOP terms for a specific class of juvenile offenders, namely those ‘ “whose crimes reflect the transient immaturity of youth,” ’ not irreparable corruption.” (*Id.* at p. 672, quoting *Montgomery*, *supra*, 136 S.Ct. at p. 743.) While recognizing that neither *Miller* nor *Montgomery* requires state courts to make explicit findings of irreparable corruption, the court in *Padilla* observed that the “stringent standard set forth in *Montgomery* cannot be satisfied unless the trial court, in imposing an LWOP term, determines that in light of all the *Miller* factors, the juvenile offender’s crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity.” (*Padilla*, *supra*, 4 Cal.App.5th at p. 673.) In the *Padilla* court’s view, *Montgomery* vitiates the holdings in *Palafox* and *Blackwell* that “a trial court complies with *Miller* ‘as long as [it] gives due consideration to an offender’s youth and attendant circumstances,’ without ruling out the possibility that the offender was subject to rehabilitation.” (*Id.* at p. 673; see also *id.* at p. 673, fn. 7.) Instead, *Montgomery* requires the trial court to “assess the *Miller* factors with an eye to making an express determination whether the juvenile offender’s crime reflects

“Did [*Montgomery*] clarify that [*Miller*] bans a sentence of life without the possibility of parole on a specific class of juvenile offenders whose crimes reflect the transient immaturity of youth, thereby requiring that trial courts determine that the crime reflects ‘irreparable corruption resulting in permanent incorrigibility’ before imposing life without parole, or does a trial court comply with the constitutional mandates of [*Miller*] by giving due consideration to the offender’s youth and attendant circumstances in exercising its discretion under Penal Code section 190.5, subdivision (b)?” (*People v. Padilla* (2017) 387 P.3d 741.)

permanent incorrigibility arising from irreparable corruption.” (*Id.* at p. 673.) Because the trial court had sentenced the juvenile defendant to LWOP before *Montgomery* was decided, Division Four remanded the case for the court to conduct a new sentencing hearing applying the *Miller* factors in light of the principles discussed in *Montgomery*. (*Id.* at pp. 674–675.)

2. The trial court must conduct a new sentencing hearing in light of *Montgomery*.

In our original opinion, we affirmed the trial court’s decision to resentence Hodge to LWOP under *Miller*. In doing so, we relied on the approach adopted in *Palafox* that a sentencing court may give whatever weight it deems appropriate to the *Miller* factors, so long as the court gives due consideration to all of the relevant factors that are supported by the record. (See *Palafox, supra*, 231 Cal.App.4th at pp. 73, 91.) Because the trial court weighed the evidence and arguments addressing those factors, we concluded the court did not abuse its discretion in finding the circumstances of Hodge’s crime outweighed the mitigating evidence.

After reconsidering Hodge’s appeal, we conclude the approach adopted in our original opinion is no longer tenable under principles set forth in *Montgomery*. As our discussion of *Montgomery* makes clear, *Miller* prohibits states from sentencing the vast majority of juvenile offenders convicted of homicide offenses to LWOP. (See *Montgomery, supra*, 136 S.Ct. at pp. 734, 735 [“After *Miller*, it will be the rare juvenile offender who can receive [an LWOP] sentence.”].) In our view, a sentencing court cannot ensure that only the rarest of juvenile offenders will be sentenced to LWOP by simply considering all of the relevant *Miller* factors, while being free to afford whatever weight the court deems appropriate to each of those factors. Instead, *Miller*’s proscription against imposing LWOP sentences on such a

large class of juvenile offenders—namely, those whose crimes reflect “transient immaturity”—necessarily requires sentencing courts to make a determination that is focused on the circumstances of the offender’s youth. (See *id.* at p. 735 [*Miller*’s requirement that sentencing court’s consider “‘youth and its attendant circumstances’” is designed to ensure that juveniles whose crimes reflect “transient immaturity” are not sentenced to LWOP terms].) Thus, before imposing an LWOP sentence on a juvenile offender, the sentencing court must determine that the offender is among the “rarest of juvenile[s]” whose crime reflects “permanent incorrigibility,” and not “transient immaturity.” (See *id.* at pp. 734, 735.)

Because the trial court reimposed Hodge’s LWOP sentence before *Montgomery* was decided, we must remand for a new sentencing hearing. In doing so, we acknowledge that the court found at the April 2015 sentencing hearing that Hodge was “incorrigible, irreparably, and is not amenable to change.” For the reasons discussed below, however, we cannot conclude whether the court would have made the same determination had its analysis been informed by *Montgomery*.

At the prior sentencing hearing, the trial court considered mitigating evidence presented by Hodge. For example, the defense presented evidence that Hodge grew up in an unstable home environment, with a father who struggled with substance abuse and was largely absent for much of Hodge’s childhood. When he was present, the father often physically and sexually abused Hodge’s mother in front of Hodge and his brother. Despite his troubled upbringing, Hodge was described by his family and friends as a fun-loving, quiet, and affectionate teenager. In addition, Hodge had never been involved in any violent or criminal act before he killed Tucker. The underlying crime, as heinous as it was, was Hodge’s first run in with the law.

The court also acknowledged evidence of Hodge's post-conviction behavior. (See *Lozano, supra*, 243 Cal.App.4th at pp. 1137–1138 [at a *Miller* resentencing hearing, the court must consider all relevant evidence of a defendant's amenability to rehabilitation, including a defendant's good behavior in prison after he was sentenced to LWOP].) Like his pre-offense behavior, Hodge's post-conviction behavior is largely positive. As of April 2015, after 20 years of incarceration, Hodge had not engaged in any significant incident of violence, had a reputation among the Department of Correction's staff as being "polite and respectful," and had participated in anger-management and drug-rehabilitation programs.

The court did not, however, consider Hodge's mitigating evidence through *Montgomery's* lens. That is, the court did not determine whether, in light of Hodge's family history, background, and pre- and post-conviction behavior, he is " "the rare juvenile offender whose crime reflects irreparable corruption." ' " (*Montgomery, supra*, 136 S.Ct. at p. 734.) In sum, we cannot conclude on this record that the trial court would have resentenced Hodge to an LWOP term if it had the benefit of *Montgomery's* guidance. As a result, we reverse and remand the matter for a new sentencing hearing. On remand, the court shall consider all evidence that is relevant to determining whether Hodge is the rare juvenile offender whose crime reflects permanent incorrigibility, including evidence of Hodge's post-conviction rehabilitation and pre-conviction plea negotiations in which Hodge may have participated. (See *Gutierrez, supra*, 58 Cal.4th at pp. 1388–1389; *Lozano, supra*, 243 Cal.App.4th at pp. 1137–1138.)

DISPOSITION

The April 13, 2015 judgment imposing Hodge's LWOP sentence is reversed and the matter is remanded for a new sentencing hearing in accordance with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

BACHNER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.